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No. 78-1127

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT W. BRADFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1978. A petition for rehearing was denied on December 18, 1978. The petition for a writ of certiorari was filed on January 18, 1979, and is therefore one day out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution based on smuggling and distribution of Laetrile, the district court properly

excluded evidence purporting to show that Laetrile is beneficial to cancer patients.

2. Whether the Double Jeopardy Clause barred separate convictions for conspiracy to smuggle Laetrile and conspiracy to distribute Laetrile.

3. Whether the evidence was sufficient to show that Laetrile had been smuggled into the United States as charged in Count 3 of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to smuggle merchandise, and one count of conspiracy to receive, buy, sell, transport, and conceal smuggled merchandise, in violation of 18 U.S.C. 371 and 545. He was also convicted on three substantive counts of smuggling and receiving smuggled merchandise, in violation of 18 U.S.C. 545. Petitioner was sentenced to three years' probation and fined $40,000.[1] The court of appeals affirmed (Pet. App.).

The evidence at trial showed that Cyto Pharma, a chemical manufacturing plant in Tijuana, Mexico, produced a surplus quantity of Laetrile that its owners decided to sell in the United States. Because customs officials seize all declared Laetrile, the operators of Cyto Pharma set up a smuggling operation and transported Laetrile into the United States on at least 14 separate occasions (Tr. 454-469, 489-498, 504-510, 529-538, 617-622, 637-648, 658-662, 664-673, 1092-1101, 1106-1113, 1143-1148, 1156-1167, 1184-1193, 2316-2317, 2406-2407, 2840-3148).

[1] A 12-count indictment was returned against petitioner and 18 other defendants. The trial of petitioner and three co-defendants was severed from that of the others. These four were each found guilty on the two conspiracy counts, sentenced to three years' probation, and fined. The court of appeals affirmed all four convictions, and this Court subsequently denied the petition for certiorari of co-defendants Richardson and Bowman (No. 78-1209) (March 5, 1979).

The evidence established petitioner's extensive involvement in this scheme. On September 27, 1973, customs agents received an anonymous tip that a blue samsonite suitcase would arrive in San Francisco from San Diego containing smuggled Laetrile (Tr. 1196, 1200, 1229, 1247). Such a suitcase did arrive later that day and was claimed by co-defendant Hector Guillermo Symonds-Gonzalez (Tr. 1263, 1273, 1287-1290). Symonds agreed to let customs officials search the bag (Tr. 1264, 1269-1270, 1296, 1299-1301). They seized 540 vials of Laetrile and 11 pounds of Laetrile pills, all from Cyto Pharma (Tr. 1270-1279, 1302-1303, 1323). Approximately one hour later, petitioner called the San Francisco customs office inquiring about the suitcase and the Laetrile (Tr. 1202-1203, 1209, 1211, 1252-1257). Petitioner was informed that the bag had been seized (Tr. 1203). He thereupon called the airport customs office and asked if the Laetrile could be released to him (Tr. 1273-1275). Neither petitioner nor Symonds could produce any documentation to show that customs duties had been paid for the Laetrile contained in the suitcase (Tr. 1250, 1256, 1313-1316, 1325).

A similar incident occurred on November 5, 1974, when co-conspirator Beverly Newkirk attempted to ship 600 vials and 4 pounds of Laetrile pills by air freight in packages falsely designated as "printed material" (Tr. 2898-3043). Airline employees noticed the sound of liquid coming from the packages, opened them, and discovered the Laetrile (Tr. 2913, 2923-2926, 2953). The next morning, airline employees notified Newkirk that the shipment was being held at the airport (Tr. 2933-2938, 2951-2955). Later that morning, petitioner arrived at the airport, identified himself as the shipper, and asked to take the shipment with him (Tr. 2938-2939, 2959-2960, 2989-2993, 3005, 3045-3050).

Other evidence showed that petitioner personally received at least two deliveries of the smuggled Laetrile and that he was involved in reselling the drug (Tr. 2430, 2541-2545, 2940-2957, 3432-3443). Testimony of two different witnesses also established that petitioner knew that the Laetrile had been smuggled across the border. Lidia Ramirez, who delivered smuggled Laetrile to petitioner, testified that she explained to him that the high price of the Laetrile was due to the fact that couriers had to be paid to bring the drug across the border (Tr. 2857-2858, 3115-3116); Elaine Pricola testified that petitioner admitted to her that the Laetrile had been smuggled into the country (Tr. 3442-3443).

Petitioner's books and records showed that he realized a gross profit of $642,556 on 729 shipments of merchandise, most of which was Laetrile (Tr. 3963, 3965, 4051-4096).

ARGUMENT

1. Petitioner argues (Pet. 4-8) that the trial court erred in excluding evidence purporting to show that Laetrile has analgesic and curative properties useful in the treatment of cancer. That evidence, petitioner contends, would support a defense of coercion or necessity because it would show that his smuggling operation was justified by the need to treat cancer patients.

This claim was properly rejected by the courts below. The defense of coercion requires the defendant to show that another person's unlawful threat caused him to fear immediate and otherwise inescapable danger of death or serious bodily injury. See, *e.g.*, *United States* v. *Housand*, 550 F. 2d 818, 824-825 (2d Cir.), cert. denied, 431 U.S. 970 (1977); *D'Aquino* v. *United States*, 192 F. 2d 338, 357-358 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); *United States* v. *Patrick*, 542 F. 2d 381, 386-387 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *Shannon* v. *United States*, 76 F. 2d 490, 492-493 (10th Cir. 1935). See also LaFave and Scott, *Criminal Law* 374 (1972). Petitioner's proffered evidence would not support the inference that his actions were "coerced" within this definition.

Petitioner's related contention that his smuggling operation was "necessary" to save the lives of other persons is equally unsupported. Violations of the law cannot be justified under the necessity doctrine where alternative lawful courses of action are available to achieve the same purposes. See, *e.g.*, *United States* v. *Mowat*, 582 F. 2d 1194, 1208 (9th Cir. 1978), cert. denied, No. 78-5276 (Nov. 13, 1978). See also LaFave and Scott, *supra*, at 387-388. As noted by the court of appeals, an alternative course of action was available to petitioner here: "[T]he obvious optional course of action was to take steps to render the 'necessary' action legal—to pursue the course taken [by other Laetrile proponents] in seeking to have the FDA classification of Laetrile set aside or to have it approved as a new drug" (Pet. App. 4-5).[2] In simple terms, the necessity doctrine is not a mandate to disobey laws that the defendant believes to be contrary to the general public welfare:

> . The common thread running through most of these cases in which the defense of necessity was asserted is that there was a reasonable belief on the part of the defendant that it was necessary for him to act to protect his life or health, or the life or health of others, from a direct and immediate peril. None of the cases even suggests that the defense of necessity would be

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[2]The plaintiff-cancer patients in *United States* v. *Rutherford*, No. 78-605 (cert. granted Jan. 22, 1979), have followed that course. There is, of course, no need to hold the instant petition pending the decision in *Rutherford*, since the charge against petitioner is smuggling merchandise into the United States in violation of the customs laws. The decision in *Rutherford* will have no bearing on the issues presented here.

> permitted where the actor's purpose is to effect a change in governmental policies which, according to the actor, may in turn result in a future saving of lives.

United States v. *Kroncke*, 459 F. 2d 697, 701 (8th Cir. 1972).[3]

2. Petitioner also contends (Pet. 8-10) that his convictions on two conspiracy counts violated the Double Jeopardy Clause of the Fifth Amendment.

Petitioner was separately charged with conspiracy to smuggle merchandise, and conspiracy to receive, buy, sell, transport, and conceal smuggled merchandise, in violation of 18 U.S.C. 545 and 371. It is well settled that separate violations may result if separate conspiracies are proven. See, *e.g.*, *United States* v. *Arteaga-Limones*, 529 F. 2d 1183, 1194 (5th Cir.), cert. denied, 429 U.S. 920 (1976); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787-788 (1946); *Braverman* v. *United States*, 317 U.S. 49, 52-53 (1942). The question whether there was one or two conspiracies was a question of fact for the jury, and there is no claim here that the jury was improperly instructed. See *United States* v. *Roselli*, 432 F. 2d 879, 898 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). As noted by the court of appeals, the evidence proving separate conspiracies was sufficient in this case (Pet. App. 7):

[3]Cases of "necessity" arise when forces of nature (*e.g.*, storms or famines) compel disobedience of a legal rule to avoid a greater injury to human life or safety. LaFave and Scott, *supra*, at 381. The FDA's prohibition against distribution of Laetrile does not give rise to "necessity" to violate federal customs laws. See *id.* at 382: "The defense of necessity is available only in situations wherein the legislature has not itself * * * made a determination of values. If it has done so, its decision governs."

> The government's theory at trial was that separate and distinct conspiracy agreements had been entered into by McNaughton and his Cyto Pharma group with respect to smuggling and with respect to receiving and distributing, and that these appellants joined both ongoing conspiracies. The government notes that the objects, members and locales of the two conspiracies differed and justified a finding of two conspiracies. It points out that the evidence links some of the coconspirators to the smuggling operation while others are linked to the distribution operation. Under these facts, "two distinguishable conspiracies may be charged, prosecuted and punished when the jury so chooses to interpret the evidence."[4]

3. Petitioner also contends (Pet. 11-12) that the evidence failed to show that the Laetrile described in Count 3 of the indictment actually entered the United States from another country.

However, the fact of illegal importation may be established by circumstantial evidence. See, *e.g.*, *United States* v. *Scott*, 446 F. 2d 509, 510 (9th Cir. 1971); *United States* v. *Gibbs*, 435 F. 2d 621, 624 (9th Cir. 1970), cert. denied, 401 U.S. 994 (1971); *United States* v. *Ingham*, 502 F. 2d 1287, 1290-1291 (5th Cir. 1974), cert. denied, 421 U.S. 911 (1975). The evidence in this case showed that on September 27, 1973, as a result of an anonymous tip, customs officials seized 540 vials and 11 pounds of Laetrile at the San Francisco airport. Thereafter, petitioner made telephone calls to the customs officials

[4]Petitioner's assertion that the decision below conflicts with *Braverman* v. *United States*, *supra*, and *United States* v. *Roselli*, *supra*, is unsupported. In those cases, the evidence showed a single conspiracy. In the present case, two separate conspiracies were proven by the government.

attempting to claim the Laetrile. Other testimony established that petitioner participated repeatedly in the smuggling operation, that the smuggling operation originated from Tijuana, and that petitioner was well aware of the movement of the Laetrile across the Mexican border. The jury could infer from this evidence that the Laetrile involved in Count 3 had been smuggled into the United States.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Because the evidence was sufficient to show illegal importation, the cases of *Sherman* v. *United States*, 268 F. 516 (5th Cir. 1920), and *United States* v. *Meyer*, 432 F. 2d 1000 (9th Cir. 1970), relied on by petitioner (Pet. 11-12), are inapposite.

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